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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 74-1542

UNION ELECTRIC COMPANY,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Eighth Circuit

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 515 F.2d 206. It is printed at pages A-1 through A-26 of Appendix A to the petition for certiorari in this case.

JURISDICTION

The judgment of the Court of Appeals (printed on page A-27 of Appendix B to the petition for certiorari) was entered on

March 27, 1975. The petition for writ of certiorari was filed on June 9, 1975, and granted as to Question 1 therein on October 6, 1975. The jurisdiction of this Court rests on 28 U.S.C. Sec. 1254(1).

STATUTE INVOLVED

This case involves the construction and interpretation of Section 307 (b)(1) of the Clean Air Act Amendments (42 U.S.C. Section 1857h-5 (b)(1)) which says:

> "A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 112, any standard of performance under section 111; any standard under section 202 (other than a standard required to be prescribed under section 202(b)(1)), any determination under section 202(b)(5), any control or prohibition under section 211, or any standard under section 231 may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d), or his action under 119(c)(2)(A), (B), or (C) or under regulations thereunder, may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation, approval, or action, or after such date if such petition is based solely on grounds arising after such 30th day."[1]

[1] Of course references to the appropriate sections in Title 42 of the United States Code are different from the quoted section references, which are made to the Clean Air Act Amendmnts.

QUESTION PRESENTED

The question, with respect to which certiorari was granted by this Court, reads as follows:

> "1. Does the Section of the Clean Air Act (Section 307 (b)(1)), which provides for judicial review by the Court of Appeals of EPA approval of sulfur dioxide emission regulations in the Missouri implementation plan, prevent the Court of Appeals from considering technological and economic factors applicable to petitioner and such regulations, when the petition for judicial review was filed more than 30 days after EPA approval of such plan, when such technological and economic factors arose more than 30 days after EPA approval and when those factors make it impossible for petitioner to comply with those regulations and manifestly against the public interest for it to attempt to do so."

STATEMENT OF THE CASE

The petitioner Union Electric Company is primarily an electric utility which serves, through its own facilities and those of subsidiaries, electric service in the St. Louis Metropolitan Area, a large part of Missouri and parts of Illinois and Iowa (A.3). It owns and operates three coal-fired generating plants in Missouri (the Labadie, Sioux and Meramec Plants) which produce the major portion of its electric requirements (A.3).

The respondent Environmental Protection Agency (EPA) is an agency of the United States, which is charged with the enforcement of the Clean Air Act as amended. (See Section 101 of the Clean Air Act—42 U.S.C. Section 1857 and particularly the footnotes thereunder.) On May 31, 1972, the Administrator of the EPA approved an implementation plan for the

State of Missouri pursuant to Section 110 of the Federal Clean Air Act as amended—also 42 U.S.C. Section 1857c-5 (See 37 Fed. Reg. No. 105, Part 3).

This implementation plan includes Section B, Regulation X of the Air Quality Standards and Air Pollution Control Regulations for the St. Louis Metropolitan Area (A. 2). And said Section B of Regulation X limits the emission of sulfur dioxide from coal burning facilities such as the three Union Electric plants mentioned above (A. 5). On May 31, 1974, the Respondent EPA formally notified Union Electric that sulfur dioxide emissions from those plants violated the requirements of Section B of the Federally approved Missouri Implementation Plan (A. 5).

On August 19, 1974, Union Electric filed a petition in the United States Court of Appeals for the Eighth Circuit requesting review of this emission regulation (A. 2). The petition set forth the facts discussed above, outlined the status of variance proceedings before Missouri Agencies (A. 4-5) and pointed out that compliance with Regulation B would require it to shut down these three plants and discontinue electric service to a large number of people in the mid-west (A. 5-6). The alternative of paying a federal fine of up to $50,000 per day[2] could, the petition alleged, impose monetary burdens and create an event of default under the Company's mortgage, which would make further financing impossible and place the Company in bankruptcy (A. 6).

The Company prayed for relief from the requirements of Regulation B, because grounds arising more than 30 days after Federal approval of the Missouri implementation plan (which includes that regulation) have made it impossible for the Company to comply therewith or, in the alternative, manifestly against the public interest (A. 6).[3]

[2] Section 113(c) of the Clean Air Act as amended (42 U.S.C. Sec. 1857c-8(c)).

The grounds arising more than 30 days after EPA approval of the plan were detailed in the petition as follows (A. 7-8, 13-15):

> 1. The Arabian Oil Embargo and related economic factors, occurring after June 30, 1972 (a date which was 30 days following approval of the plan), have resulted in such a shortage of, and high price for, low sulfur coal that it is impossible for petitioner to obtain a sufficient quantity to comply with the plan's sulfur regulation or, alternatively, the cost of such coal, if it could be obtained, would make its purchase manifestly against the public interest.
>
> 2. Since June 30, 1972, it has been demonstrated that sulfur dioxide removal equipment (scrubbers), which would enable the sulfur regulation to be met, have not been developed or invented.
>
> 3. Since June 30, 1972, the price of scrubbers so far developed has increased so much that installation costs at these three plants would be more than $500,000,000.
>
> 4. Because of economic factors, occurring since June 30, 1972, it would be impossible to obtain financing required to install such scrubbers. Alternatively, if financing could be obtained and installation effected, the carry-

[3] Section 307 (b) (1) of the Clean Air Act as amended (42 U.S.C., Section 1857h-5(b)(1)) says "A petition for review of the Administrator's action in approving or promulgating any implementation plan . . . may be filed only in the United States Court of Appeals for the appropriate circuit . . . within 30 days from the date of such promulgation, approval, or action, *or after such date if such petition is based solely on grounds arising after such 30th day.*" (emphasis added)

ing, operating and maintenance costs of over $120,000,000 annually would be manifestly against the public interest.[4]

5. Research and reports made known since June 30, 1972, disclose that sulfur dioxide in the ambient air is not the medical hazard it was previously thought to be.

6. Since June 30, 1972, it has been demonstrated that compliance with the sulfur regulation is not necessary for fulfillment of the national primary and secondary ambient air standards in the St. Louis Metropolitan area.[5]

The Court of Appeals ordered the case briefed and argued solely on the question of its subject matter jurisdiction (A. 9). A motion to dismiss for lack of jurisdiction was filed by Respondent EPA (A. 12); and a motion to dismiss for failure to state a claim and primary jurisdiction in the Missouri Air Conservation Commission was filed by that Commission and the State of Missouri, each of which had been permitted to intervene as respondents (A. 1, 10-11). Following the submission of briefs and oral argument, those motions were sustained in the opinion and judgment, which are printed on pages A-1 through 26 and A-27, respectively, of the appendices to the petition for certiorari.

The Court of Appeals held that impossibility, or other, claims based upon technological and economic factors cannot be judicially considered in a Section 307 (b)(1) proceeding, regardless of whether it is brought within 30 days of EPA approval of the plan or whether it is brought after such 30 days and admittedly based on grounds arising thereafter. The Court did

[4] With reference to these four grounds, we point out that the petition alleges that low sulfur coal or scrubbers constitute the only scientific basis for a claim that any emission regulation might be met (A. 6-7).

[5] The averment in this form became a part of the petition by amendment (A. 13-15).

not specifically refer to the question of whether such claims and factors could be considered in enforcement proceedings,[6] but strongly indicated that they may *never* be judicially considered. Thus on pages A-22 and 23 of the appendix to the petition for certiorari, the Eighth Circuit says:

> "While the (technological and economic) considerations Petitioner asserts in its petition for review are important ones needing resolution, they are not appropriate for judicial resolution but are essentially legislative judgments as to where the public interest lies . . .
>
> "This is in essence a political question. The answer should be and, when the situation is grave enough, perhaps will be made in the legislative arena." (matter in parentheses added)

With respect to Union Electric's claim that information made known since June 30, 1972, demonstrates that sulfur dioxide is not the health hazard it was once thought to be, the Court held that this constituted a challenge to a national standard, which would have to be presented first to the EPA and then reviewed in the District of Columbia Circuit, if at all (pages A-24 and A-25 of the appendix to the petition for certiorari). This holding was based principally on the statements made at pages 41 and 42 of Report No. 91-1196 of the Committee on Public Works of the United States Senate, 91st Cong. 2nd Session, accompanying S. 4358 (September 17, 1970).[7] Since the

[6] Section 113(c)(1) of the Clean Air Act Amendments (42 U.S.C. Section 1857c-8(c)(1) says that violations by a corporation or individual of federally approved state implementation plans are punishable by Federal District Courts with fines of up to $25,000 to $50,000 per day of violation and/or imprisonment of up to one or two years, dependent upon whether there has been a conviction for a previous offense.

[7] Although in many important respects this report does not give a completely clear picture of Congressional intent concerning the meaning of the Clean Air Act Amendments, it is the best (and virtually only) Congressional guide we have.

question (No. 4) in the petition for certiorari, which deals with this point, was not included in the grant of certiorari, it will not be discussed in this brief, except as it might be thought subsidiary to the question on which certiorari was granted. See Sup. Ct. Rule 40(d)(1).

Referring to petitioner's claim that information made known since June 30, 1972, demonstrates that compliance with the sulfur regulation is not necessary to meet the national air standards in the St. Louis area, the Eighth Circuit noted that state standards may be stricter than Federal, though, of course, those stricter state standards become federally enforceable standards when included in an implementation plan that is approved by the EPA.[8] We point out, however, that this ruling was not presented as a question in our petition for certiorari and thus may be considered only insofar as it is subsidiary to the question on which certiorari was granted.

SUMMARY OF ARGUMENT

Since this petition is based solely on grounds arising more than 30 days after EPA approval of the Missouri implementation plan, it is apparent that neither the EPA, which approved the plan, nor the state agency, which formulated the plan, could have considered those grounds. Consequently there is no record for the Court of Appeals to review, and that Court itself must engage in a fact-finding procedure. No one questions that Congress can constitutionally require the Court of Appeals to undertake such a task—indeed the United States Court of Appeals for the Eighth Circuit admitted that to be true in the instant case (see p. A-7 of Appendix A to the petition for certiorari).

[8] See pages A-25 and 26 of the appendix to the petition for certiorari and Sections 110(a)(2), 113(c)(1) and 116 of the Clean Air Act as amended (42 U.S.C. Sections 1857c-5(a)(2), 1857c-8(c)(1) and 1857d-1, respectively).

And, as the Eighth Circuit there indicated, the procedure to be followed would entail the appointment of a master, whose findings and record would be reviewed by the Court.

So far as we can determine, the decision of the Eighth Circuit is the first and only reported decision involving a petition under Section 307(b)(1), which is based on grounds arising more than 30 days after EPA approval of an implementation plan. As the Eighth Circuit indicated (page A-2 of Appendix A to the petition for certiorari), there have been a number of decisions involving petitions under that section, which were filed within 30 days of approval of a plan.

We believe there might be a stronger argument for judicial consideration of technological and economic factors arising after EPA approval than there would be for such a consideration at the time of approval. Presumably, at the time the 1970 amendments to the Clean Air Act were enacted, Congress was aware of the relevant facts and aspirations and could make a limited appraisal of the future. However, it obviously could not, and knew it could not, know what the facts might be, and whether such aspirations might have been achieved, several years hence.

However, the Eighth Circuit held that, at least so far as technological and economic factors are concerned, cases brought on grounds arising more than 30 days after EPA approval should be treated in the same manner as those brought within such 30 days.[8a] Examining the cases brought within the 30 day period where an industry (usually an electric utility) was a party, we find that three were decided by the Third Circuit, one by the Fourth, one by the Sixth and one by the Seventh.[9] In every one of these cases the Circuit Judges (or Supreme Court Justice

[8a] Page A-17 of Appendix A to the petition for certiorari.

[9] Citation and discussion of these cases will be found in the Argument part of this brief.

or District Judge sitting by appointment) unanimously held that technological and economic factors may be subject to judicial consideration. Thus the Eighth Circuit is the only one of the five circuits considering the point, which has held that this question is political in nature and thus not susceptible of judicial review. Both the weight and nature of authority against the Eighth Circuit holding demonstrate that it is not tenable.

Unfortunately neither the Clean Air Act Amendments nor their Congressional history precisely sets forth the intent of Congress as to the meaning of the section of those amendments which is involved in this case. However common sense indicates that the phrase "grounds arising after such 30th day"[10] would include technological and economic developments which have made it impossible to comply with the sulfur regulation and manifestly against the public interest to attempt to do so. The word "review" in this section, which the Eighth Circuit interprets as requiring an administrative record, cannot have such a meaning in the context in which it is used. Obviously when the grounds arise after the Administrator approves the plan, he could not have considered them, and made a record about them, at the time of his approval.

Referring to Congressional History, on page 42 of the Senate Report[11] the Committee on Public Works said that

> "The judicial review section, therefore, provides that any person may challenge any promulgated standard, regulation, or approved or promulgated implementation plan after the date of promulgation *whenever it is alleged that significant new information has become available.*" (Emphasis added.)

We believe that our allegations about the impossibility of compliance because of technological and economic developments

[10] Section 307(b)(1)—42 U.S.C. Sec. 1857h-5(b)(1).

[11] Report No. 91-1196, 91st Cong., 2nd Sess. (1970).

following the promulgation of the plan constitute "significant new information" within any reasonable definition of that phrase.

It is well established that an Act of Congress will be construed to be constitutional, rather than unconstitutional, when reasonably possible. Thus the process of interpreting such an Act, or any part thereof, often involves constitutional questions. The constitutional guarantee of due process requires a judicial hearing of the technological and economic possibility (and desirability) of the federally approved Missouri regulation concerning sulfur emissions.[12] As we point out in the following Argument section of our brief, there are several ways the due process requirement could be met. But we submit that an interpretation of Section 307(b)(1) to require a hearing by the Court of Appeals, after a master has taken evidence and made findings, is, in addition to meeting constitutional due process requirements, the interpretation that most clearly conforms with the Congressional intent.

[12] If we were dealing with poisonous air this might not be the case. But, as our petition alleges (A. 13-15), we are dealing with air that meets the National Air Quality Standards.

ARGUMENT

I. Congress Has the Constitutional Power to Enact Legislation Placing in the Court of Appeals for the Eighth Circuit the Jurisdiction and Duty to Engage in a Fact-Finding Process as a Basis for the Decision of This Case.

Certainly a *prima facie* interpretation of Section 307(b)(1) as it applies to petitions based on grounds arising more than 30 days after EPA approval of an implementation plan calls for fact-finding by the Court of Appeals, since the EPA could not, at the time of approval, have taken into account grounds arising thereafter. In the next point of our Argument we demonstrate more fully that this is the proper interpretation of that Section. However, we do not think we are placing the cart too far before the horse by pointing out briefly that Congress has the constitutional power to place such a jurisdiction and duty in the Court of Appeals.

Congress created the Court of Appeals pursuant to the provisions of Section 1, Article III of the United States Constitution, and it alone has the power under that provision to delineate the Court's jurisdiction, original or appellate. See *Davidson v. Gardner*, 172 F.2d 188, at p. 191 (7th Cir. 1949) and the Eighth Circuit decision in the instant case (page A-7 of Appendix A to the petition for certiorari).

As the Eighth Circuit pointed out on the page of its opinion referred to above, there are instances where the Courts of Appeal engage in fact-finding processes, and in those instances they utilize the provisions of Fed. R. Civ. P. 53(a), concerning the appointment of masters. See *N.L.R.B. v. Teamsters Local 282*, 438 F.2d 100 (2d Cir. 1970); *N.L.R.B. v. Remington Rand, Inc.*, 130 F.2d 919, 925-6 (2d Cir. 1942), and Moore's Federal Practice (2d Ed. 1974), Vol. 5A, p. 3029.

II. Section 307 (b)(1) of the Clean Air Act Amendments Places in the Court of Appeals for the Eighth Circuit the Jurisdiction and Duty of Factually Determining Whether Technological and Economic Factors Arising More Than 30 Days After EPA Approval of the Missouri Implementation Plan Have Made It Impossible for Union Electric Company to Comply With the Sulfur Emission Regulation in That Plan and Manifestly Against the Public Interest for It to Attempt to Do So.

So far as we can determine the Eighth Circuit's decision is the first and only one involving a petition based on grounds arising more than 30 days following EPA approval of an implementation plan. As we point out later in our Argument, there have been several decisions by the United States Courts of Appeal involving petitions which were filed within 30 days after EPA approval.

Offhand one might think that there are ample and similar reasons why technological and economic factors should be judicially considered, regardless of whether they arose before, or after, EPA approval of an implementation plan. However, we believe that there is a stronger argument for judicial consideration of those factors when they arise after EPA approval than there is when they arose before such approval.

We think it might be assumed that Congress had some knowledge of the relevant facts and aspirations, and could make a limited appraisal of the near future, when the 1970 amendments to the Clean Air Act were enacted. Thus the Congressional view of the energy situation[13] *at that time* is demonstrated by the statement on page 2 of the Senate Report[14] that in order to comply with the Act's requirements "Greater use of natural gas for electric power generation may be required." And no

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[13] Certainly no one would question the fact that air pollution and energy supplies and usage are closely related.

[14] Cited in footnote 11.

doubt the Act's requirements were geared to the then existing Congressional view of the availability of energy sources.

But Congress obviously could not, and knew it could not, know what the future might hold. Thus it provided for a review by the Court of Appeals of implementation plans because of new developments.[15] Certainly the evaporation of Congress' idea that the use of natural gas for electric power generation could be increased, the reduction in oil supplies due to new policies of foreign nations, the unprecedented inflation and its effect on money markets, the shortage (and inefficiencies) of low sulfur coal and the collapse of optimistic appraisals of sulfur removal techniques[16] constitute new developments which call for a review of implementation plans devised and approved under different conditions.

However the Eighth Circuit held that, at least so far as technological and economic factors are concerned, cases brought on grounds arising more than 30 days after EPA approval should be treated in the same manner as those brought within such 30 days.[17] Also we might mention that counsel for Respondent apparently desires that petitions for review be treated similarly, regardless of the timing factor, or, at least, that this Court include in its decision the treatment of petitions filed within 30 days of EPA approval.[18]

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[15] We believe it also relevant to note that with respect to standards for new sources (which look to the future more than those for existing sources) the Clean Air Act Amendments specifically provide that the EPA shall consider technological and economic factors (Section 111(a)(1)—42 U.S.C. Sec. 1857c-6(a)(1)). The EPA determination on those factors would then be reviewable under Section 307 (b)(1).

[16] As Respondent knows Union Electric was one of the first companies to attempt the development and utilization of sulfur dioxide removal equipment.

[17] Page A-17 of Appendix A to the petition for certiorari.

[18] See the statement on page 7 of Respondent's memorandum in response to the petition for certiorari that the question in the instant case is the same as that in the *St. Joe* case which clearly involved a petition filed within the 30 day period.

In any event the only reported decisions, other than the one under review, involved petitions which were filed within the 30 days. Consequently we direct our attention to them.

A. **The relevant decisions of the United States Courts of Appeal support the proposition set forth in Point II above.**

Getty Oil Company v. Ruckelshaus, 467 F.2d 349 (1972), was the first of the Third Circuit decisions. In that case the EPA approved the Delaware implementation plan on August 4, 1971. Neither Getty nor any one else had filed a Section 307(b)(1) proceeding concerning the Delaware plan within the 30 day period or for that matter by the much later date of the Court's decision.

However, prior to the filing of the instant suit, Getty had obtained an injunction in the Delaware Chancery Court restraining the Secretary of the Delaware Natural Resources and Environmental Control from enforcing the sulfur regulation in the state (now federal) implementation plan, and this injunction remained in effect throughout the instant suit. Following the grant of the state injunction, the Federal EPA notified Getty that it was violating the federal plan; and Getty filed the instant suit in the Federal District Court to restrain the Federal EPA from enforcing the federal plan.

The Third Circuit remanded the case to the District Court with instructions to enter an order dismissing the case for lack of jurisdiction. It held that Getty's claims based on technological and economic factors could be presented only in a Section 307(b)(1) petition to the Court of Appeals but that that had not been done. Consequently the Third Circuit held that the District Court did not have jurisdiction to hear those claims in the injunction proceeding Getty chose to bring.[19]

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[19] The Seventh Circuit in *Indiana & Michigan Elec. Co. v. EPA*, 509 F(2) 839, at p. 845 (1975) said that the *Getty* decision also

The decision in this case gave rise to what Courts of Appeal later referred to as the *Getty dilemma*.

The first *Duquesne* case (*Duquesne Light Co. v. EPA*, 481 F. 2d 1 (1973)) was the next Third Circuit decision. In that case Duquesne and St. Joe Minerals Corp. filed Section 307(b)(1) petitions in the Third Circuit within 30 days after the EPA approved the Pennsylvania implementation plan. Those petitions challenged the sulfur emission regulations in that plan on technological and economic grounds.

The Third Circuit had sustained motions to remand the proceedings to the EPA. However the EPA did not know what it was supposed to do on remand so it filed a Motion for Clarification. This Motion constitutes the subject matter of the first *Duquesne* decision.

The Third Circuit questioned whether Duquesne and St. Joe had been afforded a truly meaningful hearing of technological and economic matters. It also said that proceedings on the plan "occurred over sixteen months ago, before the general concern about the energy crisis and before certain problems with sulfur oxide control equipment had been fully documented" (481 F.2nd at p. 9). Consequently the Court instructed the EPA to "*either* (a) refrain from imposing any penalties on *these companies* during the pendency of their state administrative and judicial actions,[20] so long as such actions are pursued by the companies in good faith and with due diligence, or (b) afford the companies a limited legislative hearing" (481 F.2d at p. 10). As indicated in the above quotation, the Court held that relief through Section 307(b)(1) proceedings would be accorded only to those companies that had filed them.

held that Section 307(b)(2) prohibits raising technological and economic factors in an enforcement proceeding. And the Third Circuit itself so interpreted the *Getty* decision in its later decision of *Duquesne Light Co. v. EPA* (Vol. 4 of CCH Pollution Control Guide 16,133 at page 16,135—cited 1 PCG para. 15,141—3rd Cir. decided August 21, 1975.) Section 307(b)(2)—42 U.S.C. Section 1857h-5(b)(2) says that "Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement."

[20] The opinion did not clearly delineate the nature of the state actions.

Pursuant to the Third Circuit's ruling in the first *Duquesne* case discussed above, the EPA elected to conduct an administrative hearing on the feasibility of the Pennsylvania plan. *St. Joe Minerals Corp. v. Environmental Protection Agency*, 508 F.2d 743, at p. 745 (1975). As a result of that hearing the EPA concluded that the sulfur provisions in the federally approved Pennsylvania plan are "technologically infeasible" as applied to St. Joe's smelter (p. 745). However the EPA refused to disapprove the plan for that, or any other, reason on the theory that the Clean Air Act Amendments did not permit it to do so.

The Third Circuit held that disapproval by the EPA of an implementation plan for technological reasons was not barred by the Act, and it remanded the case to the EPA for action consistent with its opinion. The EPA filed a petition for writ of certiorari in this Court (No. 74-1650). However, it thereafter filed a motion to defer consideration of the petition on the ground that the case would probably soon become moot.

Duquesne Light Co. v. Environmental Protection Agency (No. 72-542 decided August 21, 1975 and reported in Vol. 4 of CCH's Pollution Control Guide at para. 15,141 (pages 16,133 et seq.—but cited as 1 PCG par. 15,141)) is the fourth and last of the Third Circuit decisions. In this revisit to *Duquesne I*, the Court reviewed the EPA Administrator's determination, after a hearing of the affected utility plaintiffs, that the sulfur emission regulation constituted a valid and enforceable part of the Pennsylvania implementation plan. The Third Circuit posed the following two questions (at p. 16,134):

"1. Did the Administrator act arbitrarily in concluding that compliance with the challenged emission limitations within the time allowed by the plan is economically feasible for the petitioning utilities' coal burning electric generating plants through the use of flue gas desulfurization devices?

"2. Did the Administrator act arbitrarily when he concluded that conformity with the sulfur oxide emission limitations by the petitioners' coal burning generators was ~~technogolically~~ technologically feasible?"

The Court then discussed at length the economic and technological factors, which had arisen since initial EPA approval of the Pennsylvania plan, and which are very similar to those on which Union Electric bases its case before this Court.

The Third Circuit held (at p. 16,142) that

". . . the matter will be remanded to the Administrator for further consideration of the economic feasibility of the sulfur oxide emission regulations in the Pennsylvania plan and for a determination of a reasonable date for compliance by the petitioning utilities. The Administrator is also directed to evaluate the technological feasibility of the emission restrictions in light of more recent developments."

Appalachian Power Company v. Environmental Protection Agency, 477 F.2d 495 is a 1973 decision by the Fourth Circuit. In that case two utilities and a steel company filed Section 307 (b)(1) petitions for review of EPA approval of Virginia and West Virginia implementation plans. All of such petitions had been filed within 30 days of approval. In holding that the EPA should certify to the Court for judicial review the full administrative record (including the record of the state proceedings to formulate the plans), the Court said (1) that the state authorities were required to hear and consider technological and economic matters, (2) that the EPA must review the state authorities' findings on those matters and (3) that the Court on judicial review should inquire whether those matters had been sufficiently considered and properly resolved. The Court indicated that, if the certified record was insufficient, petitioners could present a motion (under Section 307(c)—42 USC Section 1857h-5(c)) to remand the matter to the EPA to take additional testimony.

In *Buckeye Power, Inc. v. Environmental Protection Agency*, 481 F.2d 162 (6th Cir. 1973), several utilities filed Section 307 (b)(1) petitions within the 30 day period to review on technological and economic grounds the EPA's approval of sulfur regulations in Ohio and Kentucky implementation plans. The Court held that before approving the plans the EPA should have held "legislative" type hearings, pursuant to Section 553(c) of the Administrative Procedure Act (5 U.S.C.—Pub. L. 89-554 (1966))—page 171 of opinion. It further held that such hearings would be inadequate as to individual claims. Consequently it said that such claims could be asserted in either federal or state enforcement proceedings (p. 173). This question of the scope of enforcement proceedings will be considered more fully in our discussion of the next case we cite.

In the *Buckeye* case the Sixth Circuit confronted face on (a) the claim that the Clean Air Act Amendments constitute "technology forcing" legislation and (b) the Senate Committee's statement that "existing sources of pollutants should meet the standard of the law or be closed down" (481 F.2d at p. 168).[21] With respect to those matters the Court said:

"No such language is contained in the Act, but if such language is given effect the electric utility plants in Ohio and Kentucky would be closed down and possibly those throughout the United States. If Congress intended such a

[21] Pages 2-3 of S. Rep. No. 91-1196, 91st Cong., 2nd Sess. (1970).

far-reaching result in the 1970 Amendments to the Act, it certainly would have mentioned such intention in the body of Amendments." (481 F.2d at p. 168)

The Sixth Circuit, in answering the EPA claim that technological and economic factors are irrelevant, said (481 F.2d at p. 169):

> "We find the Agency's argument that technological feasibility, high cost benefit, and resource unavailability are irrelevant under the 1970 Amendments, devoid of merit."

Indiana & Michigan Electric Co. v. Environmental Protection Agency, 509 F.2d 839 (1975) was a Seventh Circuit decision by a rather unusual panel. Retired Associate Justice Tom C. Clark of the United States Supreme Court and Senior District Judge William J. Campbell of the Northern District of Illinois, who wrote the opinion, sat by designation. The third member of the panel, Senior Circuit Judge Robert J. Kiley, deceased, did not participate in the decision.

In this case the petitioning utilities sought within the 30 day period a Section 307(b)(1) review of the EPA's approval of the Illinois and Indiana implementation plans. As in cases we have previously discussed, judicial review of the plan's sulfur regulations was sought on technological and economic grounds. The Seventh Circuit held that Section 110 of the Clean Air Act Amendments (42 U.S.C. Section 1857c-5) did not permit judicial review of those grounds. It also held, contrary to the *Buckeye* decision, that the EPA was not required to give petitioners a "legislative" hearing of the type set forth in the Administrative Procedure Act (5 U.S.C. Section 553(c)).

However, the Seventh Circuit did hold that "arguments concerning technology and economic impact . . . may be raised in the course of enforcement proceedings under Section 113(b)" (p. 847 of opinion). In so holding the Court noted that such an interpretation of the Act would lay at rest petitioners' claims

that a construction of Section 110 to prohibit them from raising technological and economic factors in a Section 307(b)(1) proceeding would be a denial of due process of law.

The Seventh Circuit's decision that technological and economic claims could be presented only in an enforcement proceeding was based in part on the thought that in those proceedings, apparently contrary to Section 307(b)(1) proceedings, the Court could consider the situation of the individual claimant and its particular emission source or sources (p. 845). In this connection we point to the Third Circuit's holding that only parties to Section 307(b)(1) proceedings, and presumably their affected emission sources, are governed by the Court's decision. See *Duquesne Light Co. v. Environmental Protection Agency*, 481 F.2d 1, at p. 10. Also we might mention that the case before this Court is being brought by Union Electric alone and only as to its Labadie, Sioux and Meramec plants (A.8).

Before leaving the *Indiana & Michigan* decision, we want to mention a significant part of the Congressional history of the Act, which was not referred to in the Seventh Circuit's opinion. On page 41 of the Senate Report[22] the Committee says "Of course, the person regulated would not be precluded from seeking such (judicial) review at the time of enforcement insofar as the subject matter applies to him alone." (matter in parentheses added) Section 308 (the judicial review section) of Senate Bill 4358, which the Senate Committee was then discussing, did not (like the Conference substitute actually enacted) include a provision that review could *not* be obtained in an enforcement proceeding, if it could be obtained in a review proceeding before the Court of Appeals. This later restriction became a part of the Act after conference.[23] We respectfully submit that this Congres-

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[22] See the citation in footnote 11 above.

[23] Section 307 (b)(2)—42 U.S.C. Section 1857h-5(b)(2) says "Action of the Administrator with respect to which review could be obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement."

sional history demonstrates a legislative intent that judicial review as it applies to the individuals regulated must be obtained in a Section 307(b)(1) review proceeding, rather than in a Section 113 enforcement proceeding.[24]

In concluding our discussion of the foregoing decisions, we point out that each of the Circuits held that the Clean Air Act Amendments must be interpreted as permitting judicial consideration of technological and economic factors *at some time*. And as the decisions clearly demonstrate, each of the Circuits felt that, in reaching a proper interpretation, there was no doubt but that Constitutional due process required such a judicial consideration.

We respectfully submit that this authority demonstrates that the Eighth Circuit's lone conclusion that the question is political and, therefore, that the parties affected by it[25] have been stripped of constitutional protection is an untenable interpretation which is contrary to our Anglo-American system of jurisprudence.

B. **Governing provisions of the Clean Air Act Amendments and their Congressional history call for the interpretation of the Act set forth in Point II above.**

The relevant part of Section 307(b)(1) says that

> "A petition for review of the Administrator's action in approving or promulgating any implementation plan . . . may be filed only in the United States Court of Appeals for the *appropriate circuit* . . . within 30 days from the date of

[24] This was also the holding in the *Getty* case, 467 F. 2d 349 (3rd Cir. 1972).

[25] Violations of implementation plans are subject to civil and criminal penalties (including jail sentences and large daily fines) and are also subject to citizen's suits. Sections 113 and 304—42 U.S.C. Sections 1857c-8 and 1857h-2.

> such promulgation, approval, or action, *or after such date if such petition is based solely on grounds arising after such 30th day.*" (emphasis added)

Obviously Congress intended that the foregoing provision, including particularly the emphasized part, had some meaning. Indeed the Eighth Circuit felt the same way and, therefore, engaged in a search to find a meaning.[26] Apparently the best it could do was to place its reliance on the following statement at page 42 of the Senate Report.[27]

> "New information may become available at some future date which indicates that a particular pollution agent or combination of agents is hazardous to the health of persons and therefore should be added to those pollution agents subject to the provisions of section 115. Conversely, new information may become available indicating that a pollution agent for which a prohibition had been established under section 115 is not hazardous to the health of persons. If the Secretary (Administrator) failed to act in either event, the promulgation could be challenged."[28] (matter in parentheses added)

The Eighth Circuit held (1) that the foregoing paragraph requires that the "new information" relate to the question of whether and to what extent a certain pollutant is a health hazard, (2) that, since this would be a challenge to a national air quality standard, the matter must first be presented to the Administrator and (3) that a Section 307(b)(1) petition for review of the

[26] Page A-23 of Appendix A to the petition for certiorari.

[27] Cited in footnote 11.

[28] As discussed later, we think this quoted paragraph should be examined in conjunction with the paragraph preceding it and that such an examination leads to a different view of the Act as it applies to our case. However, at this point we are dealing only with the Eighth Circuit's view of the matter.

Administrator's finding could then be filed only in the United States Court of Appeals for the District of Columbia.[29]

We respectfully submit that the Eighth Circuit's decision does *not* set forth an example of an instance where a petition to review an *implementation plan* has been filed in the *appropriate circuit* on grounds arising more than 30 days after EPA approval of the plan. And we still believe that Congress intended for those provisions to have some meaning. However, we have not read of, nor have we been able to imagine, a serious and realistic example of a situation where those provisions would be given effect, if the Eighth Circuit's opinion were followed. We therefore respectfully submit that from a reading of the applicable words of the section, and the utilization of the customary meaning of those words, one must inexorably reach the conclusion that technological and economic factors fall within the meaning of "grounds" arising after EPA approval.

The word "review", as used in Section 307(b)(1), also seemed to trouble the Eighth Circuit.[30] We do not believe that that word is a word of art, as the Eighth Circuit seems to indicate. Additionally we think it should be interpreted in the context in which it is used, and in doing so we have no difficulty in including technological and economic matters as "grounds" within the meaning of the statute.

As we previously pointed out (p. 21 of this brief), on p. 41 of the Senate Report[31] the Committee said:

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[29] Pages A-24 and 25 of Appendix A to the petition for certiorari. In the later case of *Oljato Chapter v. Train*, 515 F.2d 654, at pp. 665-6 (1975), the Court of Appeals for the District of Columbia, in following the Eighth Circuit, questioned whether such a statutory interpretation "flows inexorably" from the Senate Report, but stated that the interpretation makes good sense, is consistent with the statutory scheme and, as to requiring an initial decision by the Administrator, falls within the Court's "inherent powers."

[30] Page A-7 of Appendix A to the petition for certiorari.

[31] Cited in footnote 11.

> "Of course, the person regulated would not be precluded from such (judicial) review at the time of enforcement insofar as the subject matter applies to him alone." (matter in parentheses added)

Such a statement seems quite proper in view of the fact that the judicial review section of the Senate bill (Section 308) did not preclude a person, who filed a petition for review in the Court of Appeals, from presenting relevant material in his own defense in a later enforcement proceeding.

However, the Conference substitute for the Senate bill did include such a preclusionary provision, and that provision is now the law (Section 307(b)(2)). The Senate Report, we submit, clearly shows a Congressional intent that a person should *at some time* be accorded a judicial hearing of relevant material particularly applicable to him. And, in view of the Conference substitute for the Senate bill, this judicial hearing must now be accomplished by a petition filed in the Court of Appeals. The impossibility of a person complying with requirements of an implementation plan because of recent technological and economic developments should, we submit, clearly be considered as falling within the scope of the Committee's designation of a "subject matter" applying particularly to the regulated person.

On page 41 of the Senate Report to which we have referred, the Senate Committee said:

> "The committee recognizes that it would not be in the public interest to measure for all time the adequacy of a promulgation of any standard or regulation by the information available at the time of such promulgation. In the area of protection of public health and environmental quality, it is clear that new information may dictate a revision or modification of any promulgated standard or regulation established under the act. The judicial review section, therefore, provides that any person may challenge any

promulgated implementation plan after the date of promulgation *whenever it is alleged that significant new information has become available.*" (emphasis added)

In the next paragraph of the report the Committee set forth as an example of "new information" developments or data which might require that new pollutants be added to, or existing pollutants deleted from, the list of health hazardous pollutants called for by Section 115 of the bill.

The Eighth Circuit thought that this *example* of "new information" constituted the only information falling within the Congressional intent.[32] However, we respectfully submit that new information concerning the hazardous nature of pollutants is merely *one* example of "significant new information." In addition to comporting with a common sense view of the matter, we point out that information concerning pollutants would call for review of action under Section 115 of the proposed Senate bill *only*, whereas the quoted part of the Committee Report and the judicial review section of the proposed Senate bill (Section 308) also provide for review because of "significant new information" relating to implementation plans. And implementation plans were provided for by Section 111 (not 115) of the proposed Senate bill.

The above quoted paragraph from the Senate Report refers to new information in the area of protection of "public health and environmental quality." Apparently the Eighth Circuit thought that new information concerning pollutants and their hazardous character was the only type of information which could be considered as falling within the meaning of this phrase.[33] We respectfully submit that this is far too restrictive an interpretation of the phrase. Certainly there are many

[32] Pages A-24 and 25 of Appendix A to the petition for certiorari.

[33] Pages A-23 to 25 of Appendix A to the petition for certiorari.

things that can happen in the future which will affect the "public health and environmental quality." Some of them may improve it; and some of them may worsen it. In any event common sense tells us, and assuredly Congress knew, that technological and economic developments may have an extremely important affect, for better or worse, on public health and environmental quality.

We are quite aware of the argument that the Clean Air Act Amendments constitute "technology forcing" legislation. In fact on pages 2 and 3 of the Senate Report[34] the Committee said:

> "In the Committee discussions, considerable concern was expressed regarding the use of the concept of technical feasibility as the basis of ambient air standards. The Committee determined that 1) the health of people is more important than the question of whether the early achievement of ambient air quality standards protective of health is technically feasible; and 2) the growth of pollution load in many areas, even with application of available technology, would still be deleterious to public health.
>
> "Therefore, the Committee determined that existing sources of pollutants either should meet the standard of the law or be closed down . . ."

As a matter of fact this Court itself has referred to the "technology forcing" character of the Amendments.[35] It seems to us, however that the concept of technology forcing legislation is somewhat alien to the Anglo-American system of jurisprudence. The idea of forcing a person to close down his business or go to jail (or pay high daily fines), unless science evolves a

[34] Cited in footnote 11.

[35] *Train v. Natural Resources Defense Council*, 421 U.S. 60, at p. 91 (1975).

suitable technology, seems abhorrent to us in the absence of an overriding public interest.[36] We are also aware of some statements that if a person can not meet the standards within the time allowed he can "take his case" to Congress. But Congress simply does not have the flexibility to deal with such matters. Additionally Congress is not a Court and should not be treated as one.

The idea that if enough money is spent on a scientific project it can inevitably be achieved is simply not true. Moreover the question of obtaining money for research and development is not easily resolved. Money for such purpose, so far as an electric utility is concerned, must come from investors or customers or both. There is, of course, no law requiring an investor to put his money in one business rather than another. And an examination of the prices of electric utility stocks for the past 10 years demonstrates that they have not held a great attraction for investors. As to customers, the rates of practically all electric utilities are determined by state commissions, and they generally seem to think that rates are high enough without charging extensive amounts for research purposes.

We respectfully submit that the Sixth Circuit in the *Buckeye* case[37] was correct in noting that the Act itself does not say anything about shutting down the electric utilities, and as the Court there said, Congress would surely have said so, if that had been its intention. Moreover, as we previously pointed out, the Clean Air Act Amendments were enacted with the Congres-

[36] Quite likely there would be such a public interest, if we were dealing with poisonous air. But we are not. Sections 110(e) and (f)—42 U.S.C. Secs. 1857c-5(e) and (f) provide for variances from the primary standards under somewhat political conditions; this Court in the *Train* case, cited in footnote 35, allowed variances which do not interfere with the national standards; and the petition in the instant case (A. 13-15) says that compliance with the sulfur regulation is not required to meet the national standards.

[37] 481 F.2d 162, at p. 168.

sional idea that more electric energy could be generated by gas if need be.[38] But Congress quite wisely realized that conditions might change and provided for that possibility in permitting judicial review on the basis of grounds arising after EPA approval of an implementation plan.

We submit that a sensible interpretation of both the words of Section 307(b)(1) and its history demonstrate that those grounds include significant new information relating to technological and economic factors. And those are the factors which the petition alleges in the instant case (A. 7-8).

C. **Only an interpretation of Section 307 (b)(1) of the sort set forth in Point II of this Argument will fulfill the United States constitutional requirement of due process.**

The principle that an Act of Congress must be construed in a constitutional, rather than an unconstitutional, manner when reasonably possible is firmly established by decisions of this Court.[39] There are, of course, a multitude of decisions of this, and other, Courts dealing with the provision in the Fifth Amendment to the United States Constitution, which says that "No person shall . . . be deprived of . . . property without due process of law . . ." We do not, however, think it necessary to go into those decisions other than to the limited extent in which they directly affect this case.

In the *Getty* case[40] the Third Circuit said:

[38] See page 2 of the Senate Report cited in footnote 11.

[39] See *Phelps v. U.S.*, 274 U.S. 341, at p. 343 (1927) and *Howard v. Illinois Central Railroad Company*, 207 U.S. 463, at p. 501 (1908). See also the recent decision of the Ninth Circuit applying this principle to the Clean Air Act Amendments. *Brown v. Environmental Protection Agency*, 1 PCG par. 15,142 (9th Cir. decided August 15, 1975)

[40] 467 F.2d 349, at p. 356 (3rd Cir. 1972).

"The Constitution requires an opportunity at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case. 'The formality of procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.' Boddie v. Connecticut, 401 U.S. 371, at 378 . . ."

With respect to the importance of the interests involved in this sort of litigation, we refer to the concurring opinion of Circuit Judge Clark in *Texas v. Environmental Protection Agency*, 499 F.2d 289 (5th Cir. 1974) and the opinion of Chief Judge Gibson in the instant case: In the *Texas* case, Circuit Judge Clark said (at p. 322):

"The subject matter of this action involves the health and welfare of millions of citizens, the continued business vitality of tens of thousands of firms and compliance expenditures costing billions of dollars.

"These extensive rights deserve a more orderly process of judicial reflection."

In the instant case, Chief Judge Gibson said (page A-22 of Appendix A to the petition for certiorari) that the matters asserted in the petition for review are "important" ones which are matters of concern to "almost all citizens in this country".

If we were dealing with matters presenting a clear and present danger to our citizens, such as poisonous air, or the probability of it, there could well be quite different due process (and thus hearing) considerations. But that is *not* the situation here. To the contrary, as we have previously pointed out, we are dealing with air that meets the national ambient air quality standards.

We therefore submit that a constitutional interpretation of the Clean Air Act Amendments requires *at some time* judicial

consideration (and a hearing) of the technological and economic factors we are presenting.[41]

As we see it, there are three methods by which this constitutional requirement can be met. First there is the procedure which we advocate, namely, the appointment by the Eighth Circuit of a Master to hear evidence and make findings which would thereafter be reviewed by the Court. In our opinion an interpretation of the Act in this manner reflects most clearly the Congressional intent and also meets constitutional due process requirements.

Two somewhat practical complaints can be presented respecting this procedure. In the first place it may be pointed out that there is a serious disinclination toward the placement of an original jurisdiction in the Courts of Appeal. With respect to that objection, we note that it is substantially ameliorated by the appellate court's appointment of masters. Secondly, one might claim that the Court of Appeals would not have the benefit of the EPA's expertise. We respond to that by noting that the EPA would be a party and could as such present its evidence and views.

A second interpretation of the Act, which meets due process requirements, would call for the presentation of technological and economic factors in enforcement proceedings. We have already set forth our view of Congressional intent concerning such a procedure and will not repeat it here. One practical complaint that can be made relates to a lack of judicial ability to call on the EPA's expertise, because Section 113 (a)(4)—42 U.S.C. Section 1857c-8(a)(4) which calls for a conference with the Administrator, does not legally provide for, nor practically result in, any sort of a "hearing." But again we point out that

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[41] See for instance the *Getty* decision (467 F.2d 349, at p. 356) and the *Indiana & Michigan* decision (509 F.2d 839, at p. 847).

the EPA would be a party to the enforcement proceeding and could as such present its evidence and views.

A third interpretation of the Act would entail a remand to the EPA (perhaps under Section 307(c)) to take evidence on those technological and economic matters, which would subsequently be reviewed by the Eighth Circuit. In the present posture of the case, this would require a remand by this Court to the Eighth Circuit for the purpose of entertaining such a motion by petitioner. Obviously this sort of a procedure avoids by-passing the EPA. We do think, however, that it would come close to a judicial re-writing of the Clean Air Act Amendments. Of course one question would be whether the hearing before the EPA should be adjudicatory or rule-making in nature. Although we may now be getting away from the thrust of our brief, we would think the importance of the matter and the individual nature of the claims would point toward the adjudicatory type of hearing.

But we again repeat the view first expressed that the clearest indications of Congressional intent we have (viz. the provisions of the Act itself and their Congressional history) point toward a hearing by the Eighth Circuit on the record made by its appointed master. Additionally such an interpretation meets constitutional requirements of due process.

CONCLUSION

The specific relief which we pray from this Court is that it remand the case to the United States Court of Appeals for the Eighth Circuit with instructions to appoint a Master for the purpose of taking testimony and making findings on the allegations in paragraphs 21 through 24 and 26 of Union Electric's petition as amended (A. 7-8). Such Court shall thereafter decide the case on the basis of the master's report and the request in the second prayer of the petition. (A. 8).

Respectfully submitted

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